for leave to exercise his rights as a chargee. The proceedings result not in a judgment or decree, but in the making or refusal of an order of sale. After the sale has taken place and the chargee has prepared his account, and he takes action to recover any deficiency shown thereby, different considerations will of course arise, but at the earlier stage the chargee does not sue on the agreement to repay the sum lent, but as I have said, applies for leave to sell the land the subject of the charge.

That being so, this notification has no application.

I would allow the appeal, reverse the order below, and send the matter back to the Registrar with an intimation that this Court is of the opinion that permission should be accorded to the chargee to pursue his remedies against the chargor. No order as to costs.

MUDIE, J.—I agree.

MCFALL, J.—I agree.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE ESTATE AND EFFECTS OF HENRY CHARLES TAYLOR, DECEASED.

[SELANGOR ORIGINATING SUMMONS No. 71 of 1932]

Benefit Society—Right of nominee of a deceased member to Death Allowance.

The nominee of a deceased member of a Benefit Society is entitled to the sum of money due to be paid out by the Society on the death of the member. This sum of money does not form part of the estate of the deceased and is not available for the payment of his debts.

Creditor in person.

Administratrix in person.

MUDIE, J.—This is an application by a creditor of the deceased that his debt should be paid out of monies in the hands of the administratrix which were paid to her by the Federated Malay States Benefit Society and the Mutual Provident Association, as nominee of the sums payable on the death of the deceased in respect of payments made by the deceased in his lifetime.

The estate is insolvent. The creditor is secured by a charge on certain lands of the deceased. But the value of the security is less than the debt.

Benefit Societies are governed in England by the Friendly Societies Act, 1896. Here there is no legislation on the subject. The contract entered into between the deceased and the society is that in consideration of payments made by the deceased to the society in his lifetime, the society will pay certain monies to the nominee of the deceased on his death. These monies are therefore the property of the nominee, and do not form part of the estate of the deceased. The transaction is of the nature of a gift, though it may be revocable.

It seems to me that unless and until it is set aside as a fraud on the creditors, there is a valid transfer of property. These monies therefore are not available for payment of the deceased's debts.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION]

LOKE KUI THONG .. .. .. **Appellant**

vs.

PUBLIC PROSECUTOR . .. **Respondent**

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 40 of 1932]

Public Nuisance—Criminal Procedure Code, 1926, Section 89—Powers of Magistrate.

Under Section 89 of the Criminal Procedure Code, 1926, the only power of a First Class Magistrate, when he considers that any trade is injurious to health or physical comfort, is to require the person carrying on the trade to suppress or remove that trade or occupation.

In the case of a dealer in gramophones, a First Class Magistrate has no power to make an order against him prohibiting him from making a noise by means of loud speakers and gramophones, in the course of his trade in selling such instruments.

The Hon. Mr. S. Veerasamy for the Appellant.

R. C. Cussen, Deputy Legal Adviser, for the Respondent.

THORNE, AG. C.J.—The appellant was charged before the Court of the Magistrate, Kuala Lumpur, with the offence of having played a gramophone between the 1st and 8th days of June of this year, in disobedience to an order of the Magistrate. He was convicted under section 188 of the Penal Code and fined $15.75. Against that conviction and sentence he has preferred this appeal.

The order, the terms of which are alleged to have been broken, is not set out in the record in the present appeal, but there appears on the record a notice which bears date 7th day of July, 1931, addressed to the appellant, which informs him that an order absolute has been made against him prohibiting him thenceforth from making a noise by means of loud speakers or gramophones, etc.

Under section 89 of the Criminal Procedure Code, whenever a Magistrate of the First Class considers that any trade, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed or prohibited, he may then make a conditional order requiring the person carrying on such

trade or occupation to suppress or remove such trade or occupation.

Under sections 93 and 94 of the Code, the Magistrate may in certain circumstances make the conditional order absolute, and give notice of the making of that absolute order to the person against whom the order has been made.

I must take it that the order made by the learned Magistrate is correctly represented by the terms of the notice of the 7th of July, 1931. That being so, the order of the Magistrate prohibits the appellant from making a noise by means of gramophones in the course of his trade. That is an order which the Magistrate had no power to make. His only power is to require the person carrying on the trade to suppress or remove that trade or occupation. The Magistrate has, therefore, exceeded his statutory powers, and I hold that the order is one which cannot be enforced against this appellant.

I cannot proceed to make any order dealing with that order absolute, because as the learned Deputy Legal Adviser has very properly pointed out, in the first place there is no appeal filed against that order, and in the next place the persons at whose instance that order was made are not now before the Court, and have not had an opportunity of being heard.

As to the merits, I have no doubt whatever that the persons who complained of the nuisance caused to them by the use of loud speakers and gramophones in close proximity to their offices may have a serious cause for complaint, but I do not express any opinion on the merits of their complaint, since I have myself decided that this order is not one which can properly be enforced against this appellant.

Some question arose during the argument as to what is the proper practice in such a case as this; and my view of the matter is that any person served with notice of the making of an order should appeal against that order, if he wishes to contend that the order should not have been made. That practice is contemplated by section 89 (*ii*), and it is the more convenient practice, because then the Court, which is to consider the matter, first of all has before it the record of the proceedings in the Magistrate's Court, and thus be accurately informed as to what happened, and in the next place the appellant could set out categorically his reasons for urging that the order should not have been made. It is not so convenient a practice for a person served with the order to wait until some action is taken to enforce the order, and if he then be convicted, to appeal against the conviction, for the simple reason that the record in the original proceedings is of course not then before the Judge who hears the appeal. At the same time, on an appeal against such a conviction, I am satisfied that the Court is cast with the duty of considering whether the order made is enforceable under section 188 of the Penal Code, and in this case, I am of opinion that it is not.

The appeal is, therefore, allowed and the conviction and sentence quashed.

Appeal allowed.

JOHORE.

[APPELLATE CIVIL JURISDICTION]

ANTHONY LUCAS
Plaintiff (Appellant)

vs.

THE MALAYAN CULTURES CO., LTD.
Defendants (Respondents)

[JOHORE CIVIL APPEAL No. 3 of 1932]

[BATU PAHAT CIVIL SUIT No. 28 of 1931]

Practice—costs awarded to a pauper—profit costs—taxation—appeal on question of law—Advocates and Solicitors Enactment (No. 16 of 1930) Ss. 28—35.

The plaintiff, who was admitted to sue as a pauper, was awarded costs of the action "to be taxed on the Supreme Court Scale." His Solicitor brought in a bill of costs which was taxed and allowed at $2,129.08 a considerably larger sum than the amount of the Judgment. The bill contained a number of items covering profit costs, which were allowed. The defendants' Solicitors applied to have the Registrar's taxation reviewed. The Judge reviewed the taxation and disallowed the items relating to profit costs. The plaintiff appealed against this decision. A preliminary objection was taken that no appeal could be lodged against an order relating to costs only.

Held, by the Court of Appeal (Murison, C.J., and Terrell, J.) dismissing the appeal, that, as the Order as to costs involved a question of law and principle, an appeal lay against the decision.

Held also, that no profit costs can be included in a bill of costs payable to a successful pauper litigant, in the absence of a special Order of the trial Judge to that effect.

Held further, that in no case can the amount at which a pauper's solicitors' bill is taxed exceed the amount of Judgment recovered.

Obiter, the law as expressed in Ss. 28—35, Advocates and Solicitors Enactment (No. 16 of 1930) should be amended in some clearly intelligible form.

Carson v. *Pickersgill*, (1895) 14 Q.B.D. 859, held not to apply in the State of Johore.

APPEAL from the Judgment of Burton, J., delivered on the review of the taxation of the plaintiff's Solicitor's bill of costs.

The issues raised in this appeal appear from the Judgment of Murison, C.J., below.

M. V. Pillai for the Appellant.

Chidson for the Respondents.

Cur. Ad. Vult.

On the 22nd of March, 1932, the Registrar of Supreme Court Johore Bahru, delivered the following grounds of decision:—

WEISS, Registrar.—The plaintiff, who was admitted to sue in *forma pauperis*, succeeded in recovering a judgment for a sum of money which would have disqualified him from the privileges